



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

April 15, 1994

Honorable Bob Hunter
Chair
Committee on International
and Cultural Relations
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-037

Re: Use of sales and use tax proceeds by a
development corporation for "promotional
purposes" under the Development Corp-
oration Act, V.T.C.S. art. 5190.6, section
4A (ID# 23491)

Dear Representative Hunter:

You ask whether the Development Corporation of Abilene (the "DCOA") may "grant half-cent sales tax 'development' monies" to the Expo Center of Taylor County ("Expo") to be used for "promotional purposes." The letter from Taylor County Judge Lee Hamilton which accompanied your request states that Expo has been advised that "the Development Corporation Act does not specifically allow half cent sales tax monies to be used for promotional purposes" but that "neither does the Act specifically prohibit the use of the [sales tax monies] for promotional purposes."

We understand your concern to be with the construction of the provisions of the Development Corporation Act, V.T.C.S. article 5190.6 (the "act").¹ The act provides for the establishment, by various kinds of political subdivisions, of "industrial development corporations" with authority to finance "projects" which further the development of industry. The stated purposes of the act include "the securing and retaining of business enterprises and the resulting maintenance of a higher level of employment, economic activity, and stability." *Id.* §§ 1-3. Sections 4A and 4B of the act provide for the collection in certain cities, as determined by population and other factors and subject to the approval of the electorate, of a sales and use tax of between one-eighth and one-half percent for the use of an industrial development corporation established by the city. We understand that the DCOA was established by the City of Abilene, and the sales and use tax in question adopted, under section 4A of the act, which applies *inter alia* to cities located in counties of 500,000 or fewer.

¹You do not raise and we do not address here any constitutional issues. See Tex. Const. art. III, § 52-a (authorizing legislative provisions for the making of loans and grants for the public purpose of economic development); Attorney General Opinion JM-1227 (1990) (legislation "significantly predating" constitutional amendment adding article III, section 52-a, and with no legislative history indicating its anticipation of the amendment, not to be considered as enabling legislation therefor).

Although section 4A authorizes development corporations established thereunder to exercise the powers of corporations created under other provisions of the act except to the extent of conflict with the provisions of section 4A, neither the general definitions in section 2 of the act nor any other provisions outside section 4A expressly contemplate the expenditure of funds by development corporations for "promotional purposes." *See id.* § 2(9) ("Industrial development corporation' shall mean a corporation created and existing under the provisions of this Act . . . for the purpose of financing one or more projects"), (10) ("project" includes *inter alia* "land, buildings, equipment, facilities, and improvements. . ."). Section 4A, in subsection (b)(1), specifically provides that

[a] corporation created under this section may spend no more than 10 percent of the corporate revenues for *promotional purposes* and may contract with other existing private corporations to carry out industrial development programs consistent with the purposes and duties as set out in this Act.² [Emphasis added.]

We read the specific provisions in subsection (b)(1) of section 4A to permit a development corporation such as DCOA, operating under section 4A of the act, to spend sales and use tax proceeds for "promotional purposes,"³ subject to the proviso of subsection (b)(1) that no more than 10 percent of corporation revenue may be spent for such purposes, and so long as the expenditures are otherwise consistent with the

²Subsection (b)(1) also makes provision for a higher level of spending on "promotional purposes" by corporations created by certain cities. These provisions do not apply to the City of Abilene or the DCOA.

³We note that subsection (f) of section 4A, provides that on receipt of the proceeds of the tax the city shall deliver them

to the corporation to use in carrying out its functions. Tax proceeds *may* be used to pay the principal of, interest on, and other costs relating to the corporation's bonds, but neither the bonds nor any instrument related to the bonds may give a bondholder a right to demand payment from tax proceeds in excess of those collected from the tax imposed by this section. [Emphasis added.]

Development corporations, acting on behalf of the political subdivisions creating them, are authorized, under sections 21 and 22 of the act to issue bonds for purposes of financing projects. But, given the permissive "may" in the subsection (f) provisions, and the fact that subsection (b)(1) speaks of using corporate "revenues" generally for promotional purposes, we do not read subsection (f) as precluding use of tax proceeds for promotional purposes unless those expenditures are bond related. More generally, we think a construction of subdivision (f) which forbade use of tax proceeds, the principal source of development corporations' revenue, except for bond related expenses would be untenable. We understand that, in actual practice, many development corporations receiving tax proceeds have never issued bonds.

provisions of the act and applicable state law generally.⁴ Of course, whether any particular expenditure purportedly for "promotional purposes" is indeed for "promotional purposes" and is otherwise consistent with the provisions of the act and applicable state law would depend on the precise factual nature of the particular expenditure.⁵

We note, however, in this regard that the county judge's letter suggests that the "promotional purposes" here would include "rent subsidies" and other "financial incentives" for "prospective exhibitors" at Expo. Expo, it is explained is a "Texas non-profit corporation with tax exempt status under 501(c)(3) of the Internal Revenue Code" to which Taylor County leases the Taylor County Coliseum and Fairgrounds. Expo in turn leases those facilities "to many types of exhibitors including circuses, entertainers, horse shows, rodeos, trade shows, and the like." We question whether "rent subsidies" and "financial incentives" can reasonably be characterized as "promotional purposes," and even if they could, whether expenditures for such purposes in connection with the listed "exhibitors" will further the development of the economy within the terms of the act. However, as these matters ultimately involve questions of fact, we will not be able to resolve them here.

Similarly, we note the language, used in the request and the county judge's letter, referring to the "granting" of these funds by DCOA to Expo. Although the underlying constitutional provision, article III, section 52-a authorizes the legislature to provide for the making of "loans and grants" of public money for public purposes of economic development, we find no provision in section 4A or elsewhere in the act here by which the legislature has specifically authorized development corporations formed thereunder to make "grants." *See id.* § 23 (powers of corporations). We think that the act requires that any "grant" by DCOA to Expo be made under contractual or other arrangement sufficient to ensure that the funds granted are actually used in furtherance of the purposes of the act.⁶ Again, however, whether the grant by DCOA to Expo you are concerned with satisfies these criteria would ultimately depend on the particular arrangements between the two entities and the ultimate use to which the funds would be put.

⁴We note that section 37 of the act declares that "to the extent of any conflict or inconsistency between the provisions of this Act and any other provisions of law, this Act shall prevail and control." To the extent other law is not in effect preempted by the act, however, it would apply as well to activities carried out under the act.

⁵The lawfulness of a particular expenditure would depend, for example, on the manner in which the corporation in question was established and the tax voted in. *See, e.g., id.* §§ 4 (resolution creating corporation must specify its purposes), 4A(r) (election on imposition of tax may limit use of proceeds to particular projects).

⁶The above-quoted provision of section 4A(b)(1) does specifically contemplate "contracts" by development corporations with private corporations to carry out programs permitted by the act.

S U M M A R Y

The Development Corporation of Abilene, which operates under section 4A of the Development Corporation Act, V.T.C.S. article 5190.6, may spend proceeds of the sales and use tax imposed under section 4A for "promotional purposes," subject to the proviso of subsection (b)(1) that no more than 10 percent of corporation revenue may be spent for such purposes, and so long as the expenditures are otherwise consistent with the provisions of the act and state law generally.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'William M. Walker', with a long, sweeping horizontal stroke at the end.

William M. Walker
Assistant Attorney General
Opinion Committee